

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 68

THE UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, APPELLANTS

vs.

PENNSYLVANIA RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

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In the United States District Court for the Middle District
of Pennsylvania

THE PENNSYLVANIA RAILROAD COMPANY, PETITIONER,
vs.
UNITED STATES OF AMERICA, RESPONDENT

} In Equity

Petition

To the honorable the Judges of the said Court:

The Pennsylvania Railroad Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, brings this, its petition, against the United States of America.

And thereupon your orator complains and says:

1. That it is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, having been incorporated by an act of the General Assembly of that Commonwealth approved April 13, 1846, entitled "An act to incorporate the Pennsylvania Railroad Company," and is a common carrier by railroad, possessed of all and every the corporate rights, privileges, and franchises conferred by said act and by divers other acts supplementary thereto and amendatory thereof. That its principal operating office is located in the city of Philadelphia, in the State of Pennsylvania, and that, among other places within the confines of the said State, its lines of railroad reach and are located in the city of York, Pennsylvania.

2. That the Manufacturers Association of York, Pennsylvania, is a corporation organized under the laws of the Commonwealth of Pennsylvania for the purpose of promoting the welfare of its members and of the city of York, and for other purposes, and its residence is in the said city of York.

3. That on or about the fifth day of May, A. D. 1920, the said Manufacturers Association of York, Pennsylvania, filed a certain petition with the Interstate Commerce Commission of the United States against the Pennsylvania Railroad Company, the petitioner herein, and also against the Western Maryland Railway Company and the Maryland & Pennsylvania Railroad Company, two other railroad companies whose lines reach and are in part located in the city of York, the same being docketed on the docket of the Interstate Commerce Commission as No. 11455. A copy of this petition is annexed hereto, marked "Exhibit A," and is made part hereof.

4. That by the said petition the said Manufacturers Association of York alleged that your petitioner was guilty of unlawful discrimination in that, within a limited part of the city of York, to wit, between Beaver Street and Market Street crossing, your petitioner had opened its terminal facilities to the Western Maryland Railway Company, one of the defendants in the said proceeding before the Com-

mission, and that between the same points the Western Maryland Railway Company had opened its facilities to your petitioner in such wise that the engines of either railroad and did enter upon the tracks of the other and deliver cars to and take cars from industries within the said zone, whereas the said railroad companies refused to open their terminals to a like service in other parts of the city of York and refused, in such other parts of the said city, to permit the engines of the other to enter upon their tracks, respectively, and serve the industries located thereon, all of which will more fully and at large appear on reference being had to "Exhibit A."

5. The said petition of the Manufacturers Association of York, Pennsylvania, further alleged that your petitioner was guilty of unlawful discrimination in that it had entered into a reciprocal switching arrangement with the Maryland & Pennsylvania Railroad Company, one of the defendants in the said proceeding, and refused to enter into such arrangement with the Western Maryland Railway Company, and further, that your petitioner maintained practices in other cities differing from those obtaining in the city of York, all of which will more fully and at large appear on reference being had to "Exhibit A."

6. The said petition prayed that the commission should require the defendants to cease and desist from the alleged discrimination, and further that they should be required to accord to each other the use of their terminal facilities at York, including the main line track or tracks, for a reasonable distance outside of such terminal, upon such terms and for such compensation as the commission should fix as just and reasonable for the use so required, all of which will more fully and at large appear on reference being had to "Exhibit A."

7. To the said petition your petitioner filed an answer before the said Interstate Commerce Commission, denying that the facts and things set forth in the petition disclosed any violation of law on its part, and praying that the complaint should be dismissed. A copy of this answer is hereto attached and marked "Exhibit B."

8. Answers were also filed by the other defendants in the said proceeding, to wit, the Western Maryland Railway Company and the Maryland & Pennsylvania Railroad Company, copies of which are hereto attached and marked "Exhibit C" and "D," and are made part hereof.

9. That thereafter, to wit, on or about the thirty-first day of July, A. D. 1920, a hearing in the above proceeding was had before an examiner of the Interstate Commerce Commission, R. W. Trezise, Esquire, at which time, and also on August 2, 1920, testimony was taken at the said city of York on behalf of the Manufacturers' Association of York and on behalf of the defendants in the said proceeding, including the Pennsylvania Railroad Company, your petitioner herein.

10. That thereafter, to wit, on the eighth day of June, A. D. 1922, briefs having been filed by the complainant in the said proceed-

ing and by your petitioner, the case was orally argued before the Interstate Commerce Commission at Washington, D. C., and submitted for decision.

11. That thereafter, to wit, on the eleventh day of August, A. D. 1922, the Interstate Commerce Commission made a report and entered an order in the said proceeding, a copy of which report and order is hereto attached marked "Exhibit E" and made part hereof. The order entered by the commission is in the following language, to wit:

"This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and the said commission having found in said report that the practice of the Pennsylvania Railroad Company and the Western Maryland Railway Company of extending the use of their tracks to each other for the purpose of terminal receipt and delivery of freight at industries in York within a zone described in the report, while refusing to extend the use of their tracks for the purpose of delivering or receiving freight at other industries similarly located but without the zone, under substantially similar circumstances and conditions, is subjecting various shippers and industries to undue prejudice;

"It is ordered, that said defendants be, and they are hereby, notified and required to cease and desist, on or before November 6, 1922, and thereafter to abstain, from practicing the undue prejudice found in said report to exist.

"It is further ordered, that said defendants be, and they are hereby notified and required to establish, on or before November 6, 1922, upon notice to this commission and to the general public by not less than thirty days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply rates, regulations, and practices which will prevent and avoid the aforesaid undue prejudice found in said report to exist.

"And it is further ordered, that this order shall continue in force until the further order of the commission.

"By the commission.

GEORGE B. MCGINTY,
Secretary."

[SEAL.]

13. Thereafter, to wit, on the sixth day of September, A. D. 1922, the commission entered a supplemental order in the said proceeding, the said supplemental order being in the following language:

"Upon further consideration of the record in the above-entitled case, and good cause appearing therefor,

6 "It is ordered, That the order heretofore entered in this case, which was by its terms made effective November 6, 1922, is hereby modified so as to become effective December 6, 1922, but in all other respects said order shall remain in full force and effect.

By the commission.

GEORGE B. MCGINTY,
Secretary."

[SEAL.]

14. To this petition as Exhibit F there is attached and made part hereof a copy of a blue print offered and received in the said proceedings before the Interstate Commerce Commission as Exhibit No. 12, which portrays the location in the city of York of the railroads of the three railroad companies defendant in the said proceeding, and discloses the zone hereinbefore referred to in which the Western Maryland Railroad Company and your petitioner have extended to each other the use of their tracks, respectively.

15. That whereas the said decision of the commission set forth in "Exhibit E" purports to have been decided on the eleventh day of July, 1922, it was not promulgated or served upon your petitioner until the eleventh day of August, 1922, and your petitioner had no knowledge or notice of it prior to the latter date.

16. As will appear on reference to the said opinion and order of the Interstate Commerce Commission designated "Exhibit E," all issues are resolved in favor of your petitioner, except the contention of the Manufacturers Association of York that the Pennsylvania Railroad Company and the Western Maryland Railway Company were guilty of unlawful discrimination because the reciprocal use of their respective tracks was restricted to a limited portion of the said city of York.

7 17. That the Pennsylvania Railroad Company, petitioner herein, is advised by counsel, and therefore avers, that neither the act of Congress entitled the "Interstate Commerce Act" nor any other law prohibits railroads subject to the interstate commerce act, including your petitioner and the Western Maryland Railway Company, from according to each other limited trackage facilities such as those described in the complaint filed by the Manufacturers Association of York before the Interstate Commerce Commission, and further described in the opinion of the Interstate Commerce Commission; and that the order of the Interstate Commerce Commission entered in the proceeding heretofore referred to and quoted above in this petition is consequently without lawful warrant.

18. That the Pennsylvania Railroad Company, petitioner herein, is advised by counsel, and therefore avers, that neither the act of Congress known as the "interstate commerce act," nor any other law, confers upon the Interstate Commerce Commission authority to make the order referred to and quoted above in this petition, and that the same is consequently without lawful warrant.

19. That the Pennsylvania Railroad Company, petitioner herein, is advised by counsel, and therefore avers, that neither the act of

gress known as the "interstate commerce act," nor any other law, authorizes the Interstate Commerce Commission, in a proceeding of the character heretofore referred to in this petition as pending before it between the Manufacturers Association of York, Pennsylvania and the Pennsylvania Railroad Company, and others, to make the order referred to and quoted above in this petition, and that the same is consequently without lawful warrant.

20. That the Pennsylvania Railroad Company, petitioner herein, advised by counsel and thereupon avers, that the order is arbitrary and illegal, and in violation of the provisions of the fifth amendment of the Constitution of the United States prohibiting the deprivation of life, liberty, or property without due process of law, in that, although the Commission finds that "it has not been shown to be in the public interest to require the use of the terminal facilities or main-line tracks of the Pennsylvania at York in the Western Maryland," it nevertheless undertakes to require the Pennsylvania to extend the use of its tracks and terminal facilities to the Western Maryland Railway Company in the city of York, unless it withdraws such privilege in the limited portion of York where it has heretofore accorded trackage privileges to the Western Maryland Railway Company and received in return similar privileges on the rails of that company.

That your petitioner, the Pennsylvania Railroad Company, is therefore presented with the alternative of either losing the use of the Western Maryland tracks in the limited portion of York where it has heretofore enjoyed such trackage privilege and the traffic of industries located adjacent thereto, or of extending to the Western Maryland Railway Company throughout the city of York the use of its tracks and terminal facilities, although the commission has found that this is not required by the public interest.

That the order of the Interstate Commerce Commission purporting to subject it to this alternative is unwarranted and illegal under the interstate commerce act, and is arbitrary and would, if enforced, take the property of your petitioner without due process of law.

21. That the Pennsylvania Railroad Company, petitioner herein, advised by counsel, and therefore avers, that the order of the Interstate Commerce Commission, hereinbefore referred to and quoted in this petition, exceeds the authority of the Interstate Commerce Commission in that it is not restricted to interstate commerce, and that it is therefore illegal and void.

22. That the Pennsylvania Railroad Company, petitioner herein, advised by counsel, and therefore avers, that neither the interstate commerce act nor any other law has not devolved upon the Interstate Commerce Commission the power to make the order hereinbefore referred to and quoted in this petition, since it is not restricted to interstate commerce.

23. That your petitioner, the Pennsylvania Railroad Company, is advised by counsel, and therefore avers, that the order of the Interstate Commerce Commission hereinbefore referred to and quoted

in this petition is unconstitutional and void in that it is not restricted to interstate commerce.

24. That the said unlawful order of the said Interstate Commerce Commission, made and promulgated as aforesaid in the assumed exercise of authority unlawfully claimed by the said commission under the said act, will, unless the same be enjoined and set aside, annulled and suspended by your honorable court, subject your orator to a multiplicity of suits for heavy penalties and a multiplicity of suits for the enforcement of the said order and for damages to shippers by reason thereof, and will produce irreparable damage to your petitioner.

25. Your petitioner further shows that, if it should be required to comply with the said order, even temporarily, pending final adjudication thereof of its lawfulness, it would be without means of reparation for the loss to which it would thereby be unlawfully subjected, since it would be put to the alternative, either of extending the use of its tracks and terminal facilities to the Western Maryland Railway, with the consequent loss of traffic, or of losing its trackage privilege on the rails of the Western Maryland Railway within the limited portion of York hereinbefore referred to, again with consequent loss of traffic. In consideration whereof, far as much as your petition is remediless in the premises at or by the strict rule of common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and

reviewable under the act hereinbefore mentioned, your petitioner prays that a preliminary or interlocutory order or injunction be entered restraining and suspending the order of the said Interstate Commerce Commission until the final determination of this cause, and that, upon the final hearing of this suit, a decree be entered herein enjoining, setting aside, annulling and suspending the said order of the Interstate Commerce Commission and enjoining the enforcement of the said order.

Your petitioner further prays that your honors direct that due and proper notice of this petition for injunction be served forthwith on the respondent herein, on the Attorney General of the United States, and on the Interstate Commerce Commission.

Your petitioner further prays that your honors may grant unto said petitioner a writ of subpoena directed to the said respondent, the United States of America, commanding it, on a certain day therein to be specified, to appear before this honorable court, and then and there full, true, and complete answer make to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived), and to perform and abide by such order and decree herein as your honors shall deem, mete, and agreeable to equity and good conscience.

And your petitioner will ever pray, etc.

THE PENNSYLVANIA RAILROAD COMPANY,
By (Sgd.) F. W. WHEATON,
Solicitor and Counsel.

11 [Jurat showing the foregoing was duly sworn to by J. L.
Eysmans omitted in printing.]

12 *Exhibit A to petition*

(Docket No. 11455. Filed May 5, 1920)

Before the Interstate Commerce Commission

MANUFACTURERS ASSOCIATION, OF YORK,
Pa.

vs.

THE PENNSYLVANIA RAILROAD COM-
pany, Western Maryland Railway
Company, Maryland and Pennsyl-
vania Railroad Company

I. C. C. Docket No. —

Complaint

1. The complainant is a corporation organized under the laws of Pennsylvania, consisting, at the present time, of more than a hundred industries in York County, Penna., principally in the city of York (which includes East York) and the borough of West York (which municipalities are a single business community, and are hereinafter referred to as York). It is organized to promote the welfare of its members and of the city of York and for other purposes.

2. The respondents are common carriers, engaged in interstate commerce, subject to the act to regulate commerce, as amended, and to the transportation act, approved February 27, 1920.

The Pennsylvania Railroad Company operates two lines through York, viz., extending from Harrisburg, Pa., through York to Baltimore, and from Columbia, Pa., through York to Frederick, Md. The Western Maryland Railway operates a line from York to a junction with its main line at Porters, Pa. The Maryland and Pennsylvania Railroad Company operates a line from York to Baltimore, Md.

3. The tracks of the Pennsylvania Railroad are physically connected in the city of York with the tracks of the Western Maryland and with the tracks of the Maryland and Pennsylvania. Traffic can be and has been interchanged by these connections.

13 4. The Pennsylvania Railroad has opened its terminal facilities between Beaver Street, in the city of York, and Market Street crossing in the borough of West York, to the Western Maryland, and the Western Maryland has opened its terminal facilities between the same two streets (hereinafter termed the unrestricted zone) to the Pennsylvania Railroad, in such wise that the engines of either railroad can and do enter upon the tracks of the other and deliver cars to and take cars from industries within the

unrestricted zone located on either railroad. Such traffic is transported by both railroads at the flat York rate, i. e., the same rate as is charged from industries on the line which performs the line haul.

5. The Pennsylvania Railroad and the Western Maryland Railway refuse to open their terminals west of Market Street crossing and east of Beaver Street (hereinafter called the restricted zones), i. e., each refuses to permit the engines of the other to enter upon its tracks and serve the industries located on its line within such restricted zones, although the circumstances and conditions are substantially similar, and the service refused is a service like that contemporaneously rendered to industries within such unrestricted zone. Traffic between industries located on either railroad and points on the other railroad (including points in the city of York on the other railroad) and on the lines of its connections, is interchanged at Hanover, Pa., or other points outside of York. Such service is slower, more expensive, and in other respects less satisfactory than the service rendered to industries in the unrestricted zone. The rates charged for such traffic are in many instances higher than the rates charged from points in the unrestricted zone, under substantially similar circumstances and conditions as aforesaid.

6. The Pennsylvania Railroad and the Maryland & Pennsylvania Railroad have entered into a reciprocal switching arrangement whereby traffic originating in York on either line destined to points on the other, or on its connections, and traffic originating on either line, or on its connections, destined to industries in York
14 located on the other line, is interchanged in York and switched between the interchange point and the industry by each carrier without charge to the other and without charge to the shipper in excess of the line haul rate. By this arrangement all industries in York on the Maryland & Pennsylvania can ship to all points on the Pennsylvania and its connections at the flat York (P. R. R.) rate, and all industries in York on the Pennsylvania can ship to most points on the Maryland and Pennsylvania and its connections at the flat York (M. & P.) rate.

7. The Pennsylvania Railroad and the Western Maryland Railway refuse to enter into such a reciprocal switching arrangement with each other, notwithstanding there is a physical connection and such interchange is entirely practical, and the circumstances and conditions are substantially similar to those of the interchange and reciprocal switching of the Pennsylvania Railroad and the Maryland & Pennsylvania. As a consequence of this refusal industries on the Western Maryland have not a free outlet over the Pennsylvania and the Maryland & Pennsylvania and their connections, and industries on the Pennsylvania and the Maryland & Pennsylvania have not a free outlet over the Western Maryland, except in so far as this is permitted to industries in the unrestricted zone, as explained in paragraph 4 hereof. Traffic to and from industries in the restricted zones is interchanged at Hanover, Pa.; on other points outside of York, a service slower, more expensive, and less satisfac-

tory than interchange at York, a separate charge is made for such service (except where, in some cases, through rates are published).

8. The respondents interchange at York certain traffic originating on the line of the Western Maryland outside of York destined to points on the other outside of York. Contemporaneously, and under substantially similar circumstances and conditions, the said carriers refuse to interchange at York traffic originating at or destined to York as aforesaid.

9. At other cities near York the said carriers perform the service of interchange within the city and reciprocal switching, or
15 permit the use of their tracks to engines of other roads, or both, under circumstances and conditions substantially similar to those at York, where such service is refused as aforesaid.

10. The rates and practices hereinabove set forth are unjustly discriminatory as against York and subject complainants to undue or unreasonable prejudice or disadvantage, and make or give to other persons or localities undue or unreasonable preference or advantage, and by reason thereof the defendants refuse to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivering of property to and from their several lines and those connecting therewith, and are otherwise in violation of the act to regulate commerce as amended (particularly sections 1, 2, and 3 thereof) and of the transportation act of 1920.

11. The complainants further charge that it is to the public interest and is practicable, without substantially impairing the ability of the defendant or defendants owning or entitled to the enjoyment of terminal facilities at York, to handle its or their own business, to require the use of such terminal facilities, including main track or tracks for a reasonable distance outside of such terminal of each defendant, by the other defendants.

12. The said unlawful rates and practices have for many years greatly hampered the development of York and restricted its commerce and have greatly damaged the city and its industries, the members of complainant corporation.

13. Wherefore, the complainant prays that the respondents be required to answer this complaint and that a hearing be had, and that an order be entered by the commission correcting these unlawful rates and practices, as follows:

1. Requiring the carriers serving York to interchange at York all traffic originating at York or destined to York.

2-a. Requiring the use of all terminal facilities at York, including
main line track or tracks for a reasonable distance outside of such
terminal, of any carrier, by the other carriers, on such terms
16 and for such compensation as the commission may fix as just
and reasonable for the use so required.

2-b. Establishing the service of reciprocal switching throughout York, i. e., requiring each of the carriers serving York to switch from industry or interchange to interchange or industry in York

without extra charge to the shipper in addition to the rate charged by the line haul carrier between industries on its line and points outside of York.

3. Requiring the establishment of through routes from and to all industries in York via interchange at York to and from all points on the lines of the respondents at joint rates not higher than the flat York rate, i. e., the rates applying from and to industries located on the line which transports the traffic into or out of York, and requiring the provision of reasonable facilities for operating such through routes.

4. Requiring the defendants to desist from the unjust, unreasonable, and discriminatory rates and practices above set forth and to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivering of property to and from their several lines and those connecting therewith.

5. Granting such other relief as to the commission shall appear to be just and necessary.

MANUFACTURERS ASSOCIATION OF YORK, PA.,
By ROBERT E. GEPHART, *Secretary*.

ALLEN S. OLMSTED, 2nd.

WM. A. GLASGOW, Jr.

1018 Real Estate Trust Bldg., Philadelphia, Pa.,

Attorneys for Complainant.

Endorsed.—Before the Interstate Commerce Commission I. C. C. Docket No. . Manufacturers Association of York, Pa., vs. The Pennsylvania Railroad Company, Western Maryland Railway Company, Maryland and Pennsylvania Railroad Company.

17

Exhibit B to petition

Before the Interstate Commerce Commission

MANUFACTURERS ASSOCIATION OF YORK, PA. }

vs.

RAILROADS }

Docket No. 11455

Answer of the Pennsylvania Railroad Company

The above-named respondent, for answer to the complaint filed in this proceeding, respectfully states:

1. This respondent is without sufficient information to enable it to admit or deny the allegations of paragraph 1 of the complaint, and accordingly prays that due proof thereof be required.

2. This respondent admits that it is a common carrier engaged in part in interstate commerce and that as to such commerce it is subject to the act to regulate commerce and the acts amendatory thereof

and supplementary thereto so far as the same are constitutional and enforceable.

3. It is admitted that there is a physical connection between the tracks of the Pennsylvania Railroad Company and the tracks of the Western Maryland Railway Company in the city of York, but the connection is not adapted to the interchange of traffic such as is prayed for in the petition, nor is the track layout adapted to the handling of junction traffic at this point.

4. Answering the averments of paragraph 4 of the complaint, this respondent admits that there is an arrangement between it and the Western Maryland Railway Company whereby the engines of either railroad can and do enter upon the tracks of the other and deliver cars to and take cars from industries located adjacent to the tracks of the respective railroads between Codorus Creek, in the City of York, and Market Street crossing, in the borough of West York. It denies that this constitutes an opening of its terminals to the Western Maryland Railway Company. With respect to the rates referred to in the fourth paragraph of the complaint, leave is craved for greater certainty to refer to the tariffs duly published and on file with the Interstate Commerce Commission.

5. It is admitted that this respondent and the Western Maryland Railway Company refuse, respectively, to permit the engines of the other to enter upon their tracks and serve industries located on their lines in the city of York, except in the locality referred to in the answer to paragraph 4 of the complaint, but it is denied that the circumstances and conditions in the other portions of York are substantially similar to those prevailing in the locality referred to, and it is denied that the service is a like service to that in the locality in question. It is admitted that, to some extent, traffic between industries located on either railroad and points on the other railroad is interchanged at Hanover, Pa., and at other points outside of York, but it is denied that such service is slower, more expensive, and in other respects less satisfactory than the service rendered to the industries in the locality referred to in the answer to paragraph 4 of the complaint. With respect to the rates referred to in this paragraph of the petition, leave is craved for greater certainty to refer to the tariffs duly published and on file with the Interstate Commerce Commission.

6. This respondent denies that it and the Maryland & Pennsylvania Railroad Company have entered into a reciprocal switching arrangement applicable at York. On the contrary, no such arrangement has been entered into, the traffic between these roads being handled at joint rates, all of which will more fully and at large appear upon reference being had to the tariffs duly published and on file with the Interstate Commerce Commission.

7. It is admitted that the Pennsylvania Railroad Company and the Western Maryland Railway Company refuse to enter into a

reciprocal switching arrangement with each other, but it is denied that there is a physical connection making such interchange entirely practicable, and it is also denied that there is any reciprocal switching arrangement between the Pennsylvania Railroad Company and the Maryland & Pennsylvania Railroad Company. The remaining averments of paragraph 7 of the complaint not specifically answered in the foregoing, are denied.

8. Answering the first sentence of paragraph 8 of the complaint this respondent avers that there are no cases where traffic originating on the line of the Western Maryland Railway Company outside of York, destined to points on the Pennsylvania Railroad outside of York, is interchanged at York. The averments the second sentence of paragraph 8 of the complaint are denied.

9. The averments of paragraph 9 of the complaint are too indefinite to permit specific answer. To the extent to which answer is required, leave is craved for greater certainty to refer to the tariffs duly published and on file with the Interstate Commerce Commission.

10. The averments of paragraph 10, 11, and 12 of the complaint are denied.

Wherefore this Respondent prays that as to it the complaint filed in this proceeding be dismissed.

THE PENNSYLVANIA RAILROAD COMPANY,
By (Sgd.) J. B. LARGE,
Freight Traffic Manager.

HENRY WOLF BIKLE,
Of Counsel.

Exhibit C to petition

Before the Interstate Commerce Commission

MANUFACTURERS ASSOCIATION	} Docket No. 11455
vs.	
PENNSYLVANIA RAILROAD ET AL.	

Answer of Western Maryland Railway Company

For answer to complaint filed in this proceeding this defendant respectfully states:

20 (1) That it assumes the averments of this paragraph to be correct.

(2) That it admits that it is a common carrier engaged in part interstate commerce and that as to such commerce it is subject to the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto, and to the transportation act, approved February 28, 1920.

That it admits it operates a line from York, Pa., to a junction with its main line at Porters, Pa.

(3) That it does not have a regularly established interchange with the Pennsylvania Railroad in York.

(4) That it admits the averments of this paragraph.

(5) That it admits the averments of this paragraph.

(6) That it does not have sufficient information to either affirm or deny the averments of this paragraph.

(7) That this defendant has not entered into a reciprocal switching arrangement with the Pennsylvania Railroad because of no regularly established interchange and while both lines jointly use a certain piece of track, as referred to in paragraph (4) of the complaint, such piece of track is not considered practicable for use as a regular interchange.

That it denies the remaining averments of this paragraph.

(8) That it admits the interchange at York of certain traffic originating on Western Maryland Railway outside of York destined to points on Pennsylvania Railroad outside of York, but this is restricted to certain traffic by reason of York not being a regularly established interchange point.

(9) That it admits at certain common points it has reciprocal switching arrangements with other carriers.

(10) That it denies the averments of this paragraph.

(11) That it denies the averments of this paragraph.

(12) That it does not have sufficient information to either affirm or deny the averments of this paragraph.

21 Wherefore, having fully answered, this defendant prays that as to it the petition of complainant herein be dismissed.

WESTERN MARYLAND RAILWAY COMPANY,

(Signed)

By J. W. ALLISON,

Freight Traffic Manager.

Exhibit D to petition

Before the Interstate Commerce Commission

MANUFACTURERS ASSOCIATION OF YORK, PA., }

vs.

THE PENNSYLVANIA RAILROAD COMPANY }

et al.

I. C. C. Docket No. 11455

Answer of Maryland and Pennsylvania Railroad Company

The above respondent answering the complaint filed in this proceeding respectfully states:

Paragraphs 1, 2, 3, 4, and 5 of the complaint.—The statements are correct in so far as they refer to the Maryland and Pennsylvania Railroad; this is, the respondent is a common carrier engaged in interstate commerce; it operates a line of railroad from York, Pa., to Baltimore, Md., and has track connections at York, Pa., with the Pennsylvania Railroad Company via which traffic can be and is daily interchanged with said Pennsylvania Railroad Company. The re-

spondent has no definite knowledge of the conditions respecting the track connections or the interchange of traffic between the Pennsylvania Railroad Company and the Western Maryland Railroad Company. The respondent has no physical connection at York, Pa., or any other point with the Western Maryland Railroad Company.

Paragraph 6 of the complaint.—This respondent denies that it has any reciprocal switching arrangement with the Pennsylvania Railroad Company or that it is practicable or desirable or necessary for the public convenience for an arrangement to be made where-
22 by the locomotives of either company may operate on or over the tracks of the other. It is admitted, however, that traffic consigned to or shipped by industries located on the tracks of this respondent at East York and moving into or out of York over the rails of the Pennsylvania Railroad is transported at the same rates as those applying to or from York (P. R. R.). These rates are covered by various tariffs duly published and on file with the commission. It is also admitted that in some cases, particularly in respect to class rates, the rates between York (P. R. R.) and Maryland and Pennsylvania Railroad line points are the same as rates between East York (M. & P. R. R.) and such M. & P. R. R. line points.

Paragraph 7 of complaint.—This respondent admits that shipments cannot be made between York, Pa. (W. M. Ry.), and line points on the Maryland and Pennsylvania Railroad at the same rates as apply between East York (M. & P. R. R.) and such line points on the Maryland and Pennsylvania Railroad. The averments of this paragraph relative to interchange of traffic between the Western Maryland Railway and Pennsylvania Railroad are matters in which this respondent has no direct interest or definite information.

Paragraphs 8 to 11, inclusive, of complaint.—This respondent has no knowledge of the conditions which these paragraphs allege exist.

Paragraph 12 of complaint.—This respondent specifically denies that it is or has been a party to any unlawful rates or practices.

Wherefore, in view of the foregoing answers and the fact that this complaint is apparently directed principally against the conditions governing the interchange of traffic at York, Pa., between the Pennsylvania Railroad Company and the Western Maryland Railway Company, this respondent prays that as to it the complaint filed in this proceeding be dismissed.

MARYLAND AND PENNSYLVANIA
RAILROAD COMPANY,

(Signed) By O. H. NANCE,
President and General Manager.

Baltimore, Md., June 1st, 1920.

Exhibit E to petition

MANUFACTURERS ASSOCIATION OF YORK, PA., }
 v. } No. 11455
 PENNSYLVANIA RAILROAD COMPANY ET AL. }

Submitted June 8, 1922. Decided July 11, 1922

1. Upon the facts of record, the use of the terminal facilities of Pennsylvania Railroad at York, Pa., by the Western Maryland Railway not shown to be in the public interest.

2. The practice of the Pennsylvania Railroad and the Western Maryland Railway of each extending to the other the use of its tracks to effect terminal receipt and delivery of carload freight at industries within a limited zone in York found unduly prejudicial to shippers in York without the zone.

3. The practice of the Pennsylvania Railroad in interchanging at York and switching carload traffic to and from its junction with the Maryland & Pennsylvania Railroad within the city found not unduly prejudicial to the Western Maryland Railway, its patrons, or their traffic.

William A. Glasgow, jr., and Allen S. Olmsted, 2d, for complainant.

Henry Wolf Bickl  and George Hay Kain for Pennsylvania Railroad Company.

George S. Schmidt and E. Philip Stair for Western Maryland Railway Company.

Michael S. Niles for Maryland & Pennsylvania Railroad Company.

Report of the Commission

CHISON, Commissioner:

The parties filed exceptions to the report proposed by the examiner, and the case was argued orally.

York is a city of approximately 50,000 inhabitants in southern Pennsylvania. It is served by the lines of railroad owned and operated by the defendants, known as the Pennsylvania Railroad, the Western Maryland Railway, and the Maryland & Pennsylvania Railroad. We will refer to these defendants as the Pennsylvania, Western Maryland, and Maryland & Pennsylvania, respectively. The Pennsylvania and Western Maryland do not interchange at York carload traffic destined to or originating within that city, but interchange such traffic at Hanover, Pa., about 19.5 miles from York, and at other connecting points.

Complainant is an incorporated association of business interests of York, which, as herein referred to, comprises also the boroughs of North York and West York. It alleges that the Western Maryland and Pennsylvania each use the tracks of the other

to receive or deliver freight at industries within a limited zone within the city; that the Pennsylvania and Maryland & Pennsylvania interchange traffic at York on the basis of the York rates; that certain traffic passing through York is there interchanged between the Pennsylvania and the Western Maryland; that defendants interchange traffic under reciprocal arrangements with each other and with other carriers at cities near York; that defendants refuse to render similar services to all shippers at York; and that defendants' practices and rates resulting therefrom are unduly prejudicial to York and certain shippers therein and unduly preferential of other shippers and localities and otherwise in violation of sections 1, 2, and 3 of the interstate commerce act. Complainant further alleges that it is in the public interest and practicable to require the use of the terminal facilities of each defendant by the other defendants. It asks us not only to remove the alleged undue prejudice but to place all shippers within the city of York on an exact equality by requiring either interchange at that point, reciprocal switching, the use by one carrier of the terminals of the others, or the publication of joint rates on the York basis to and from all industries wherever located.

The Pennsylvania assumed the burden of the defense. The Western Maryland expressed willingness to provide its just proportion of adequate interchange facilities, to enter into a switching arrangement with the Pennsylvania on a reciprocal basis, and also to absorb the charges of the Maryland & Pennsylvania. The Maryland & Pennsylvania took no active part in the proceeding.

The Pennsylvania's northerly and southerly line from Harrisburg, Pa., to Baltimore, Md., intersects within York another of its lines which runs easterly from Frederick, Md., and connects with the main line at Lancaster, Pa. These two lines use the same tracks passing the freight station at York. The Western Maryland serves York by means of a branch from Porters, Pa., which terminates at York and enters into only that portion of the city located in the northwestern angle formed by the lines of the Pennsylvania. The terminals of the Western Maryland are a short distance north of the Pennsylvania's freight station located at the junction of its two lines. The line of the Western Maryland approaches the Frederick-Lancaster line of the Pennsylvania until immediately west of Codorus Creek, where the rights of way are adjacent. Continuing westward their rails parallel each other for about $1\frac{2}{3}$ miles, and they diverge to converge again at Hanover. The Maryland & Pennsylvania extends
26 from Baltimore to York and connects with the Pennsylvania in the eastern portion of the city.

The Pennsylvania has two classification and make-up yards at York, with a total available capacity of 363 cars. One is located east and the other north of its freight station. The Western Maryland's swamp yard accommodates 48 cars. There are two points of physical connection between these two railroads, short switch tracks which connect the lines within the zone hereinafter described. No tracks have been constructed with a view to use in interchanging traffic between the two lines. The interchange tracks of the Penn-

sylvania and Maryland & Pennsylvania are adequate but not extensive. There is no continuity of rails between the Maryland & Pennsylvania and the Western Maryland except over the lines of the Pennsylvania.

The lines of the Pennsylvania which serve York are a consolidation of various roads built between 1838 and 1876. The Pennsylvania was firmly established when the Baltimore & Harrisburg Railway, the predecessor of the Western Maryland, entered York in 1893. The right of way selected by the latter being adjacent, as described, to the right of way of the Hanover & York Railroad, now the Pennsylvania, crossed the plant tracks of various industries north of that road and severed them from it. The Baltimore & Harrisburg, therefore, entered into contracts with these industries and agreed to preserve their ability to receive and deliver freight via the Hanover & York. A further agreement between the Baltimore & Harrisburg and the Hanover & York in substance provided, among other things, that, for the mutual benefit of the parties and the residents of York, each line would receive from and deliver to the other at the nearest convenient point of connection loaded and empty cars for the purpose of delivering or receiving traffic to and from points in the city of York accessible to one carrier but not to the other. It was provided that the charge for this service should not exceed actual cost. The contract described the territory as west of Beaver Street, where the Hanover & York Railway connected with the present Harrisburg-Baltimore line.

The provisions of the contract were not followed literally. In lieu of the method provided in the contract, each carrier has long operated with its own power over short switch tracks to the tracks of the other, and thence over these tracks to the sidings where deliveries are made to the various industries. In practice, receipt and delivery of traffic is now limited to industries located between Codorus Creek and West Market Street. The carrier which performs the line haul effects terminal receipt and delivery at industries within the zone from Codorus Creek to Market Street. Although the tracks continue side by side for some distance west of West Market Street, such industries are construed to be beyond the agreement. If an industry with track connections with the Western Maryland within the zone wishes to forward a car via the Pennsylvania lines, the Pennsylvania furnishes the car, issues the bill of lading, and moves the shipment. If a car is delivered by the Western Maryland to an industry upon the Pennsylvania lines within the zone, the Western Maryland collects the freight and demurrage charges. Neither line pays per diem charges or keeps any record of cars handled to or from industries on its lines by the other carrier. Each carrier has in the past refused to extend the arrangement to include industries without the zone, or to handle in any manner, except via Hanover or other junction points, traffic on which the other carrier has received the line haul. The Western Maryland has expressed a willingness to handle such traffic at York in the future on a reciprocal basis.

There are about 300 industries of various kinds at York. More than 100 have spur tracks connecting them with one or more carriers. There are 17 industries within the zone; of these 8 connect with the Western Maryland, 7 with the Pennsylvania, and 2 with both lines. East and west of the zone, where the railroads diverge, are 8 industries with industry tracks leading to both the Pennsylvania and Western Maryland. Also outside the zone 46 industries are reached exclusively by the various lines of the Pennsylvania, 27 by the Maryland & Pennsylvania, and 5 by the Western Maryland. During an average month the inbound and outbound traffic of the Pennsylvania and that handled in connection with the Maryland & Pennsylvania amounted to 107,613 tons and that of the Western Maryland to 23,427 tons. If reciprocal switching were established 86,000 tons of this traffic now controlled by the Pennsylvania would be open to the competition of the Western Maryland and 6,696 controlled by the latter would be open to the competition of the Pennsylvania.

Under the agreement between the carriers they accord the industries within the zone all advantages which would accrue to them if there were interchange at York with mutual absorption of switching charges. The record discloses in detail the disadvantages of industries within York located outside the zone. As typical of the situation, the York Body Corporation and the Martin-Parry Corporation, competing manufacturers of automobile bodies, may be selected. Both are located on the Western Maryland, the former approximately in the center of the zone and the latter 1 mile west of its competitor's plant and about 500 yards outside the zone. Traffic to and from the plant of the York Body Corporation is handled by the Pennsylvania at the York rate, as if the industry were connected

with its rails. If a car consigned to its competitor arrives in 44 York via the Pennsylvania, the consignee must either dray the contents to the plant or have it reshipped to Hanover via the Pennsylvania and back via the Western Maryland, a total distance of 39 miles. Rates from York to York via Hanover are ordinarily on a class basis, and the sixth-class rate applicable on much of the traffic is 11 cents per 100 pounds. The additional cost of reshipping via Hanover is usually in excess of \$30 per car. In order to minimize its disadvantages, the Martin-Parry Corporation has constructed a siding connected with the Pennsylvania and trucks its freight to and from its plant when it utilizes the Pennsylvania's rails at York. The cost of drayage to this company alone is \$13,000 per annum. Other industries on both the Western Maryland and Pennsylvania are in the same situation as the Martin-Parry Corporation, with the added disadvantage of being required to dray a greater distance to and from the public team tracks.

All shippers within the zone can utilize the services of both the Western Maryland and the Pennsylvania, and equally with other shippers on the Pennsylvania the service of the Maryland & Pennsylvania. Shippers within the zone are unaffected by embargoes, shortage of general equipment, or lack of special equipment occur-

ing on one line; they can at all times utilize their loading or unloading devices; they are in a position to take advantage of the lower rate when the rates between York and originating or destination points differ via the Western Maryland and the Pennsylvania; they can utilize the short routes with an attendant saving of time; and they are saved at all times in connection with the line-haul movements from the additional expense, inconvenience, and delay of draying or of the additional haul to Hanover and back. Where shippers on the Western Maryland and the Pennsylvania without the zone do not dray, they are practically in the same position as if located on these lines in cities 39 miles apart, but with the added disadvantage that failure to route or errors by shippers or carriers may subject them to inconvenience and expense.

The Pennsylvania contends that the disadvantages to which the shippers outside the zone have been subjected were mainly due to abnormal conditions, misrouting, or lack of proper routing instructions; and that embargoes and shortage of equipment are not to be expected under normal conditions. Joint class rates on the flat York basis have been established by the Pennsylvania and Western Maryland between York and points on their respective lines applying via Hanover or other connecting points. This arrangement will ordinarily involve a haul through York by the Pennsylvania and a back haul from Hanover by the Western Maryland on traffic originating north, south, and east of York. There are in effect a number of commodity rates over like routes. The testimony indicates there is a complete understanding between the carriers to publish such additional commodity rates on the same basis as circumstances may justify. This arrangement does not extend to points located on the connections of either carrier. Terminal routing must be specified to secure delivery at the joint rates provided. If through ignorance of the circumstances attending delivery at York a shipper at a distant point fails to designate terminal delivery, the car may arrive on the wrong road with attending inconvenience and expense. The shippers within the zone are not required to have terminal routing specified in order to enjoy the York rates.

The Pennsylvania also contends that any advantages inuring to the industries within the zone are the result of their natural location and are not created by the carriers, and that legally and practically these industries are situated as if they were located between the two roads.

From the standpoint of carriage, the situation of industries inside and outside the zone is substantially similar. They apparently form parts of one business community. The advantage of the shippers within the zone results from the contract of the carriers and not from a controlling transportation difference.

In further justification of the alleged unequal treatment of industries at York, the Pennsylvania cites *Alford v. C., R. I. & P. Ry. Co.*, 3 I. C. C., 519, and urges that a limited trackage agreement is not unlawful and does not result in an unreasonable disadvantage to

the territory not accorded its benefits. We there found that nothing was done for anyone located on the line used under the contract that was not done for complainant. Here the Pennsylvania and Western Maryland extend to each other the use of certain portions of their tracks for the purpose of rendering a service to shippers which is refused to other shippers substantially similarly located, adjacent to their lines, within the same community. The agreement here provides for the interchange of traffic, and is not a trackage agreement.

The Maryland & Pennsylvania and the Pennsylvania effect the interchange of traffic at York under a joint rate arrangement and not by mutual absorption of switching charges. Joint rates on the flat York basis apply between industries on the Maryland & Pennsylvania and points on the Pennsylvania and its connections and between industries on the Pennsylvania and points on the Maryland & Pennsylvania. The Pennsylvania also switches traffic not covered by the prorating arrangement from its junction with the Maryland & Pennsylvania at a charge of 42 cents a ton, which charge is not absorbed by the Maryland & Pennsylvania. Complainant

30 relies on that part of section 3 of the interstate commerce act which requires carriers subject thereto to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and prohibits discrimination in rates and charges between connecting lines, and claims that the situation above described constitutes a discrimination between connecting carriers. Complainant's contention is that the manner of publication of rates is a distinction in form only, and that the advantages to industries on the Pennsylvania and on the Maryland & Pennsylvania are the same as those resulting from reciprocal switching. We thus have the issue whether the action of the Pennsylvania falls within the practice condemned by us in what is known as the Newcastle case, reported at 29 I. C. C., 114, sustained by the Supreme Court in *Pennsylvania Co. v. United States*, 236 U. S. 351.

The arrangement with the Maryland & Pennsylvania does not apply to traffic originating at or destined to points beyond the Maryland & Pennsylvania. Joint class rates on the York basis, as well as certain commodity rates, have also been established by the Pennsylvania and Western Maryland, between York and points on their respective lines, with interchange at Hanover. The Pennsylvania endeavors to distinguish the present situation from that before us in the Newcastle case, *supra*, since the Western Maryland is not tendering cars at the same point as is the Maryland & Pennsylvania. In the Newcastle case all connecting carriers tendered cars at the same point; and interchange facilities were extended to certain carriers but were refused the petitioner. This principle of equality in facilities and rates obviously applies where the conditions for interchanging with the respective connecting carries are substantially equal, as was the fact in the case just cited. If these conditions are materially different, the dissimilarities created by the facts themselves may justify a variation in the application of the principle to

respond with the actual condition. As stated in N. Y. & N. Ry. v. N. Y. & N. E. R. R. Co., 4 I. C. C. 702, 721:

Discrimination occurs when a difference is made between connecting lines similarly situated. A difference founded on actual dissimilarities in the service or the convenience of interchange, and adapted to the difference in circumstances, is not discrimination."

In the case before us the Pennsylvania has not refused to interchange York traffic with the Western Maryland at points where such interchange seems feasible; nor is the Western Maryland here conceding that its existing interchange arrangements with the Pennsylvania as to the York traffic are unsatisfactory. It is willing to enter into reciprocal switching arrangements with the Pennsylvania at York, since to do so would be greatly to its advantage.

The Western Maryland and the Maryland & Pennsylvania enter York from opposite sides of the city. Traffic is tendered at different points and under different circumstances and conditions. The Maryland & Pennsylvania has interchange tracks, which are adequate, although not commodious. To require the Pennsylvania to interchange with the Western Maryland within the city of York would involve the use of private sidings or tracks now used for other purposes and would result in further congestion. While this operation would not be attended by insuperable difficulties, it is apparent that the interchange would have attendant operating difficulties, would be less convenient, and that the service required would be correspondingly dissimilar to that performed in interchange with the Maryland & Pennsylvania. There is no basis on this record for a finding of unjust discrimination or undue prejudice because of the different treatment accorded by the Pennsylvania to its connections at York.

In the majority of cities reached by both the Pennsylvania and the Western Maryland they have entered into reciprocal switching arrangements. The Pennsylvania has entered into such agreements with other carriers at cities near York. It is not clear that the situation in these cities is similar to that at York. The Pennsylvania insists that it has not entered into reciprocal switching arrangements at any point where it controls the preponderance of the traffic, as it does at York. In certain cities where it predominates it has entered into a joint arrangement with other carriers as to traffic on which it has received a line haul, for the transfer between industries or team tracks in the same city at a charge of 56 cents per ton, plus \$7 per car. Seemingly this switching rate does not apply from junction points of the railroads.

The Pennsylvania and Western Maryland interchanged traffic at York for a time during Federal control. Coal was interchanged from December 27, 1917, to March 31, 1919; carload merchandise from February 1, 1918, to April 30, 1919; and less-than-carload merchandise from September 1, 1918, to October 1, 1919. About 3,000 cars were interchanged while the practice continued. Certain private tracks of the York Fair Association located in the western part

of the zone were used in effecting the interchange. When these were insufficient to accommodate the traffic, a spur track of the Western Maryland and the passing siding of the Pennsylvania were used. The Western Maryland absorbed the switching charges of the Pennsylvania, but the Pennsylvania did not reciprocate. The parties are not in accord as to the results of the interchange. Complainant asserts that the service furnished was satisfactory;

but it seems to us that it was attended with great operating
32 difficulties and impaired the Pennsylvania's ability to serve its own shippers. Officials of the Pennsylvania are apprehensive that even if the tracks then used were now available, the volume of increased local and through traffic would render the service still more difficult.

Complainant advances the claim that all shippers at York are entitled to equal service and rates, and that reciprocal switching or other arrangement to the same end is in the public interest and practicable without impairing the ability of the Pennsylvania to handle its own traffic. As showing public interest, its argument in short is that this method would remove all present inequalities and discriminations and give each shipper in York the benefit of service by three railroads. The Pennsylvania takes the position that an arrangement which would permit its competitor to share its preponderance of traffic would be unjust and would deter the extension of railroad facilities in the future and create more public inconvenience than it would relieve.

Complainant does not contend that we should require the reciprocal use by the Western Maryland of the Pennsylvania tracks other than those west of the junction of its two lines, but asserts that a reciprocal switching arrangement would be entirely practicable. The Western Maryland concedes that a spirit of cooperation would permit such service to be given with the present facilities; and suggests that if the Fair Association tracks are unavailable for interchange tracks the swamp yard tracks and the tracks which formerly were used may be used again for such interchange. Adequate and convenient interchange facilities can be constructed with little difficulty and at no great expense. Complainant asserts that the number of cars actually handled would not be increased, but that they would merely be handled in a different manner, which ordinarily would not entail any greater use of the tracks and terminal facilities than results from the present methods.

We have before us evidence as to the facilities for interchanging traffic at York which details the classification and make-up yards, the extent of the use of these yards and other tracks in York, and the actual operations of handling cars. The terminal facilities of the Pennsylvania at York have not been substantially increased for nearly 20 years. In addition to the heavy traffic to and from York proper the Pennsylvania handles a large volume of freight destined to points on its various lines extending from York. All the traffic converges at the junction of its two lines. In addition to

these local movements, 30 through freight trains and 50 passenger trains pass the junction point daily. The lines are operated under a block system, grade crossings are numerous, and a city ordinance requires low speed. It is often necessary to hold freight at points outside of York during periods of congestion.

The Pennsylvania State Railroad Commission, upon petition of complainant in 1909, found that the shippers located outside the zone were unduly prejudiced and recommended the removal of the discrimination. When the Pennsylvania attempted to comply with that recommendation by withdrawing from the interchange arrangement, it was restrained by order of the United States Circuit Court. The Pennsylvania commission then did not have power to issue a mandatory order, and the method provided for making its recommendation obligatory was not pursued to a conclusion.

Complainant asks that we give shippers and receivers of freight affirmative relief by one of three requirements, or a combination thereof, as follows: (1) The mutual extension of trackage rights; (2) the establishment of interchange at York, the publication of reasonable switching charges, and absorption by the line-haul carrier of such switching charges; or (3) establishment of through routes and joint rates with interchange at York on the flat York basis between all industries therein, and all points on the lines of defendants and their connections.

In support of the relief sought complainant contends that defendants are derelict in the duty imposed upon carriers to provide transportation upon reasonable request and to establish through routes and to provide reasonable facilities for operating such through routes. It asserts that we have full power to direct the employment of any or all of the means suggested to place all shippers at York upon an exact equality both as to service and rates by reason of the addition of the words "except as provided in section 3" to paragraph (4) of section 15 of the interstate commerce act, the omission of the former restriction upon the commission "but this shall not be construed as requiring any such common carrier to give the use of its tracks and terminal facilities to another carrier engaged in like business" from paragraph (3) of section 3; and the additional powers conferred in paragraph (4) of section 3 of the act to require the joint use of terminal facilities when found to be in the public interest and practicable, without substantially impairing the ability of the owning carrier to handle its own business.

In determining what is "in the public interest" in a given case, as antecedent to the affirmative exercise of this broad grant of power, we must take into consideration not only the interests of the particular shippers located at or near the terminal involved but also the interests of the carriers and of the general public. In this case to require the Pennsylvania to afford use of its terminal facilities by another carrier would be tantamount in practical effect to requiring a division between such carriers of traffic naturally tributary to the Pennsylvania. The loss to the Pennsylvania and the gain to the Western Maryland would each be considerable.

There is no showing that the shippers are so inadequately served at present that we are warranted, from the standpoint of the public interest, in depriving the carrier first on the ground of an important volume of the traffic originating along its line, by the direct and affirmative exercise of the power to require the Pennsylvania to share its terminal facilities with the Western Maryland, and it is therefore unnecessary to decide as to the practicability of such an arrangement.

Complainant proceeds upon the theory that its members are entitled to the York rates and to through routes with interchange of all traffic at York. The Pennsylvania contends that it can not be compelled to receive or deliver traffic at an arbitrary point, that no adequate interchange facilities are available, and that in the formation of through routes it is protected by the short-haul provision in section 15 of the act.

The fact that the interchange facilities are inadequate for convenient operation is not of itself a defense if through routes are shown to be necessary or desirable in the public interest. Facilities for interchange exist; if inadequate, they may be made adequate to perform the service which the law requires. *St. Louis, Springfield & Peoria R. R. v. P. & P. U. Ry. Co.*, 26 I. C. C. 226, 231. Nor is the fact that a carrier would be deprived of its long haul an answer to a charge of undue prejudice under section 3. But here the record does not afford a basis for the establishment of through routes, either by requiring the publication of joint rates or by the establishment of reasonable switching charges, with respect to traffic which might be handled by the Pennsylvania and the Western Maryland.

We find that it has not been shown to be in the public interest to require the use of the terminal facilities or main-line tracks of the Pennsylvania at York by the Western Maryland.

We further find that the practice of the Pennsylvania and the Western Maryland of extending the use of their tracks to each other for the purpose of terminal receipt and delivery of freight at industries in York within the zone hereinbefore described, and of thereby according to shippers within the zone the benefit in service and rates of location upon both lines, while contemporaneously refusing to extend the use of their tracks for the purpose of delivering or receiving freight at other industries similarly located within the city of York, but without the zone, or otherwise to accord to shippers without the zone the benefit of the service and rates of both lines, is

unduly preferential of shippers within the zone, and subjects
35 shippers on their lines without the zone to undue prejudice and disadvantage.

We further find that the practice of the Pennsylvania in interchanging traffic with the Maryland & Pennsylvania and switching traffic to and from its junction with that road while contemporaneously refusing to interchange and to switch traffic to and from the Western Maryland at York has not been shown on this record to be unduly prejudicial to the Western Maryland, to shippers and consignees patronizing its routes and to the traffic of such patrons, and

is not unduly preferential of the Maryland & Pennsylvania shippers and consignees over that route and their traffic.

We will enter an appropriate order.

Commissioner HALL concurs in the result.

POTTER, Commissioner, dissenting in part.

I dissent from the majority report in so far as it finds that undue prejudice results from the practice of the Pennsylvania and the Western Maryland in extending, each to the other, the use of its tracks to effect terminal receipt and delivery of carload freight at industries within a limited zone in York.

The lines which now are part of the Pennsylvania system were the first to enter York, and most of the industries at that point are located on the rails of the Pennsylvania. When the line which is now the Western Maryland was built into York between the line of the Pennsylvania and certain industries which were served by the Pennsylvania over sidings running north from its line, some arrangement became necessary which would preserve the ability of the Pennsylvania to continue to serve such industries. The contract referred to in the majority report was entered into in July, 1893, and provided for an interchange between the two roads of traffic to and from a limited area in which industries were reached by the rails of the Pennsylvania, and to which it owed a duty to render service, which was affected by the construction of the new line.

While the terms of the contract provided for an interchange of traffic between the two roads, the contract was not observed in actual practice. Instead, each carrier has operated over the tracks of the other the same as if those tracks were its own. It is the practice of the carriers which we are called upon to consider. It is apparent from the acts of the parties that they mutually agreed to grant each other trackage rights over their rails within the zone in question, and that the operation is in fact performed under what is commonly known as a trackage agreement or arrangement.

36 If the Pennsylvania had in fact made physical extensions of its line to serve industries located in the trackage zone at York, reached only by the rails of the Western Maryland, it could not be successfully contended that its failure to make similar extensions of its line to all other industries at York, to which it owes no duty to render transportation service, would result in undue prejudice. We have repeatedly held that where one road serves a community or industry located on the tracks of another under a trackage arrangement, the situation is in effect the same as if it had extended its rails to such community or industry. *Commercial Club of Superior, Wis., v. G. N. Ry. Co.*, 24 I. C. C. 96; *Penick & Ford v. Director General*, 61 I. C. C. 173.

A carrier must be allowed some latitude for the exercise of business judgment and discretion in determining the field into which it will extend its operations. Having due regard for the provisions of the interstate commerce act, and the conditions under which the arrangement here under consideration had its inception, to my mind

there is ample warrant for restricting the scope of the trackage operations.

The industries located in the trackage zone are to be considered as on the rails of both the Pennsylvania and the Western Maryland. The industries beyond the zone are on only one line. The situation of the zone industries is substantially different from industries which are not within the zone. Any advantage enjoyed by the industries within the zone by reason of their service by two roads, over industries outside the zone which are served by only one road, is not undue. *Ridge Coal Mining Co. v. M. P. R. R. Co.*, 62 I. C. C. 259, and *Dering Mines Co. v. Director General*, 62 I. C. C. 265.

Under the law, as I understand we have construed it, we are not at liberty to make a finding of undue prejudice where certain shippers are served by a carrier by virtue of ownership or trackage and an extension of the carrier facilities would be required to serve other shippers. A carrier must use its existing facilities impartially. It is under no obligation to extend or curtail them except when required under express provisions of the statute. Where carriers in what they do or refrain from doing are acting within their lawful rights, we can not find that any resulting disadvantage or prejudice is undue. Many industries outside of the trackage zone were located after the trackage practice was established, and presumably with full knowledge as to its zone limitations. An industry selecting a disadvantageous location because of low land values or for other reasons has no right to call upon carriers to overcome such disadvantage at the carriers' expense.

37 We can, under section 1, paragraph (21), of the act, require a carrier to extend its facilities under certain circumstances and conditions not here existing but not otherwise. We can, under certain circumstances, under section 3, paragraph (4), accord to one carrier the use of another carrier's terminal facilities, but relief under this section is specifically denied in the report.

The error which, as I see it, the majority report commits is serious. The principle applied will be far-reaching in its consequences. Earnings from long hauls are the justification and reward for establishing facilities and developing territory. To the accomplishments of carriers in such development work is due the relative prosperity reflected in their security values. The position in the financial world of the securities of the Pennsylvania is due to its success in this regard. I do not think that the majority report conserves the strength and value of the position of that carrier to the reasonable extent to which it is entitled.

It seems to me, further, that in finding undue prejudice we should be specific respecting the shippers or areas with which we deal. If the majority report and the order are to be construed as finding that throughout the entire city of York conditions are substantially similar to those within the trackage zone, the finding would clearly appear to be unwarranted. The record shows much dissimilarity of conditions in varying degrees. There is much more warrant for finding similarity of conditions in the trackage zone and an area

lying immediately west than there is in the areas east, which can be served only through a section so seriously congested that the introduction of service by another carrier would be likely to have a disadvantageous result to all concerned.

The complaint should be dismissed.

I am authorized to state that Commissioner Cox concurs in this dissent.

Commissioner EASTMAN did not participate in the disposition of this case.

38 *Order*

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of July, A. D. 1922

No. 11455

Manufacturers' Association of York, Pa., v. Pennsylvania Railroad Company, Maryland & Pennsylvania Railroad Company, and Western Maryland Railway Company

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and the said commission having found in said report that the practice of the Pennsylvania Railroad Company and the Western Maryland Railway Company of extending the use of their tracks to each other for the purpose of terminal receipt and delivery of freight at industries in York within a zone described in the report, while refusing to extend the use of their tracks for the purpose of delivering or receiving freight at other industries similarly located but without the zone, under substantially similar circumstances and conditions, is subjecting various shippers and industries to undue prejudice:

It is ordered, that said defendants be, and they are hereby, notified and required to cease and desist, on or before November 6, 1922, and thereafter to abstain, from practicing the undue prejudice found in said report to exist.

It is further ordered, that said defendants be, and they are hereby, notified and required to establish, on or before November 6, 1922, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will prevent and avoid the aforesaid undue prejudice found in said report to exist.

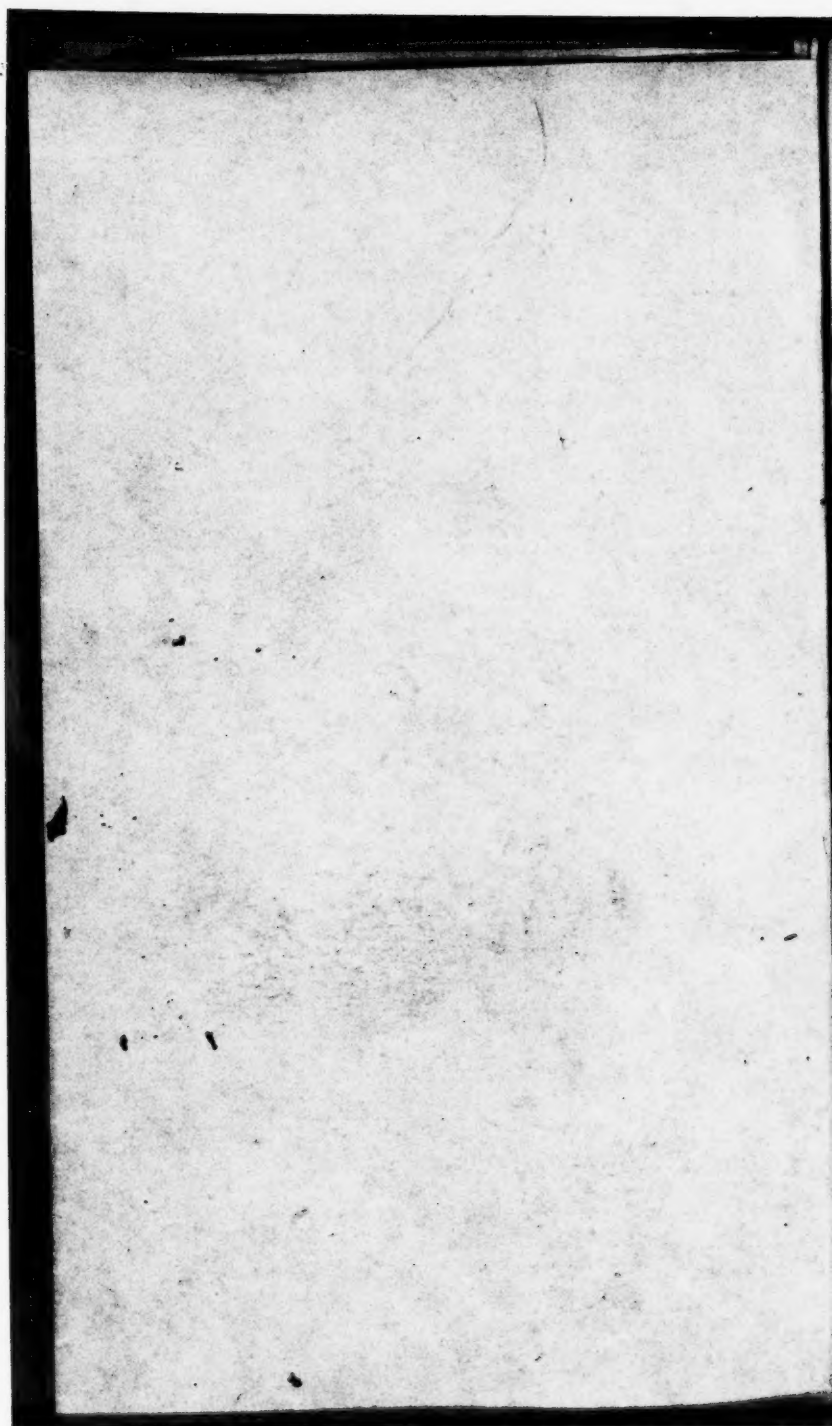
And it is further ordered, that this order shall continue in force until the further order of the commission.

By the commission.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

**BLUEPRINT
TOO
LARGE
FOR
FILMING**



40

In District Court of the United States

[Title omitted.]

Motion to dismiss petition filed October 28, 1922.

United States of America, respondent, by its counsel, now comes and moves the court to dismiss the petition in the above-entitled cause at the cost of the petitioner.

41 As grounds for this motion it is shown:

1. The petition with the exhibits attached thereto and made a part thereof is without equity on its face and does not state any cause of action against the respondent, and the court may not grant the relief prayed or any part of the same.

2. The report of the Interstate Commerce Commission and order entered in pursuance thereof were made and entered after full hearing and due notice, and rest on substantial evidence adduced on the issues made by the parties, and the matters and things alleged in the petition and sought to be put in issue are foreclosed by the findings of fact.

3. It appears from the petition and the exhibits attached thereto and made a part thereof that the order of the Interstate Commerce Commission sought to be enjoined, set aside, annulled, or suspended was authorized by the act to regulate commerce as amended and the transportation act, 1920, and that it was regularly made and entered by the commission in a proceeding properly pending and conducted.

4. The petitioner has not in and by the petition shown that in making the order the Interstate Commerce Commission transcended the power conferred upon it by the statute or violated any right of the petitioner protected by the Constitution of the United States or any other right of the petitioner over which the court may exercise jurisdiction.

Wherefore, and for divers other good causes appearing on
42 the face of the petition, more fully to be pointed out on the hearing hereof, respondent prays that its motion be sustained, and for such other and further action as may be appropriate.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

ANDREW B. DUNSMORE,

United States Attorney, Middle District of Pennsylvania.

43

In United States District Court

[Title omitted.]

Motion of Interstate Commerce Commission to dismiss petition

Filed October 16, 1922

Now comes the Interstate Commerce Commission, Intervening respondent in the above-entitled suit, and moves the court to dismiss the petition in said suit upon the grounds that—

1. There is no equity in the petition.

2. The petition does not contain statements or allegations of fact which entitle the petitioner to the relief or any of the relief prayed for by it in and by said petition.

(Signed) P. J. FARRELL,
For Interstate Commerce Commission,
Intervening Respondent.

[File endorsement omitted.]

44

In the United States District Court

[Title omitted.]

Opinion

Filed March 9, 1923

Before Davis, Circuit Judge and Witmer and Gibson, District Judges.

Davis, Circuit Judge.

The Pennsylvania Railroad Company filed its petition praying that the orders of the Interstate Commerce Commission made on August 11, 1922, and September 6, 1922, against it and the Western Maryland Railroad be suspended until final hearing and determination. These orders were entered at the suit of the Manufacturers Association of York, Pennsylvania, wherein it sought to have the practices for the interchange of traffic between the Pennsylvania Railroad and the Western Maryland Railway within a certain zone in York extended throughout the entire city by those two railroads and the Maryland and Pennsylvania Railroad. The tracks of the Pennsylvania and the Western Maryland approach each other at Codorus Creek and run parallel through the city westwardly for about one and two-thirds miles.

The Pennsylvania Railroad, which serves York, is a consolidation of various roads built between 1838 and 1876. The predecessors of the Western Maryland entered York in 1893, and that portion of its tracks which runs through the city adjacent to the tracks of the

Pennsylvania crossed the Pennsylvania's plant tracks which connected it with various industries on the northern side of the road and severed them from it. The Western Maryland, therefore, entered into contracts with those industries by which it agreed to preserve their ability to receive and deliver freight from and to the Pennsylvania. A contract was entered into also between the Pennsylvania and the Western Maryland by which "each line would receive from and deliver to the other at the nearest convenient point of
45 connection loaded and empty cars for the purpose of delivering or receiving traffic to and from points in the city of York accessible to one carrier but not to the other," within the territory described as being west of Beaver Street, where the Hanover & York Railway, now Pennsylvania, connected with its present Harrisburg-Baltimore line. The charge for this service was not to exceed actual cost.

A practice grew up between these two companies which was not in strict accordance with the contract whereby each company received and delivers freight from and to industries located on the tracks of the other company just as though the tracks of both companies were common property without either company making a charge to the other for the use of its tracks. This practice is confined to industries located on the tracks of these two companies within the zone between Codorus Creek and West Market Street and is not extended westward beyond West Market Street to industries outside of this zone, although the tracks of the two companies run side by side for some distance beyond the zone. At the time the contract was entered into by these companies and the practice was started the zone doubtless included all the industries that were then located on their parallel tracks. "There is no continuity of rails between the Maryland and Pennsylvania and the Western Maryland except over the line of the Pennsylvania Railroad." The situation with regard to the industries in York is clearly set forth in the opinion of the Interstate Commerce Commission:

"There are about 300 industries of various kinds at York. More than 100 have spur tracks connecting them with one or more carriers. There are 17 industries within the zone; of these 8 connect with the Western Maryland, 7 with the Pennsylvania, and 2 with both lines. East and west of the zone, where the railroads diverge, are 8 industries with industry tracks leading to both the Pennsylvania and Western Maryland. Also outside the zone 46 industries are reached exclusively by the various lines of the Pennsylvania, 27 by the Maryland & Pennsylvania, and 5 by the Western Maryland. During an average month the inbound and outbound traffic of the Pennsylvania and that handled in connection with the Maryland & Pennsylvania amounted to 107,613 tons and that of the Western Maryland to 23,427 tons. If reciprocal switching were established.

86,000 tons of this traffic now controlled by the Pennsylvania would be open to the competition of the Western Maryland and 6,696 controlled by the latter would be open to the competition of the Pennsylvania."

46 The interchange of traffic between the two companies from industries located without the zone is not made at York but at Hanover, some 19 miles distant from York. Consequently, if an industry located on the Western Maryland not within the zone desires to ship freight to some other part of York located on the Pennsylvania Railroad, that freight is taken by the Western Maryland to Hanover and there transferred to the Pennsylvania and by it brought back to its destination in York. This practice, it is claimed, results in hardship and commercial disadvantage to industries located on the parallel tracks of either company outside the zone and gives to the industries located in the zone an undue and unreasonable preference and advantage over industries similarly situated on the parallel tracks outside of the zone. It can not be denied that this practice is a great commercial advantage to those industries located in the zone over those outside of the zone. The Pennsylvania, which is bearing the burden of this litigation, objects to extending the practice because it would open its freight to the other companies and would result in loss and disadvantage to it because it controls a larger proportion of the freight in York than do the other two companies.

The commission ordered that "said defendants be, and they are hereby, notified and required to cease and desist, on or before November 6, 1922, and thereafter to abstain from practicing the undue prejudice found in said report to exist."

The petitioner is not questioning any administrative finding of the commission that "a given prejudice or discrimination is undue or unjust." Such finding relates to an administrative question of fact and is not reviewable here. It relies upon the principle of law that no prejudice, preference, or discrimination prohibited by the act can result from the possession, extension, or acquisition of trackage facilities by one carrier over the tracks of another. Under section

3 of the act of 1887 to regulate commerce, it was provided that it should be unlawful for any common carrier subject to the act
47 to give any undue or unreasonable preference or advantage to any person, company, firm, or locality, or to subject any particular person, company, firm, or locality to any undue or unreasonable disadvantage in any respect whatsoever. It also provided that every common carrier subject to the act should according to their respective powers afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and to those connecting therewith and should not discriminate in their rates and charges between such connecting lines. It further provided that these provisions "shall

not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to other carriers engaged in the same business." The transportation act of 1920, however, provided that "if the commission finds it to be in the public interest and to be practicable without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, or any carrier, by another carrier or other carriers," etc.

The commission did not specifically state in what way the defendants were to cease and desist from practicing the undue prejudice found; whether by extending the practice to industries outside the zone or by stopping the practice altogether. The commission could have ordered the extension of the practice to industries outside the zone, if it had found the same to be "in the public interest and to be practicable." But the commission found as a fact that it had "not been shown to be in the public interest to require the use of the terminal facilities of the main-line tracks of the Pennsylvania at York by the Western Maryland," and so under that finding and so long as it stands the commission may not order the practice existing between the two companies within the zone extended to industries situated along the parallel tracks outside the zone. It follows, therefore, that the only way by which they can order the companies to cease and desist from practicing the undue prejudice is by abolishing those practices within the zone.

It has been repeatedly held that where one company serves a community or industry located on the tracks of another under a track-sharing arrangement the situation in effect is the same as if the former company had extended its own tracks to such community or industry. *Commercial Club of Superior, Wis. v. Great Northern Ry.*, 24 C. C. 96; *Penick & Ford v. Director General*, 61 I. C. C. 173; *Louisville & Nashville Railroad Company v. United States et al.*, 12 U. S. 60. The industries, therefore, located along the tracks of either company in the zone are in law to be considered as on the individual tracks of both companies, and the industries beyond this zone as located on the tracks of one of the companies only. Consequently in legal effect those industries which are within the zone and those without the zone are not similarly situated, but are in a substantially different position. And so the advantage enjoyed by the industries within the zone over those without the zone is not, within the meaning of the act, an undue or unreasonable preference. *Edge Coal Mining Co. v. Missouri Pacific R. R. Co.*, 62 I. C. C. 259; *Spring Mines Co. et al. v. Director General*, 62 I. C. C. 265; *Louisville & Nashville Railroad Company et al. v. United States et al.*, supra. "A carrier must use its existing facilities impartially," and the railroads, under the facts in this case, are under no obligation to extend or curtail their facilities. The legal position of the in-

dustries in the zone is just the same as though they were located at some other part of the city away from the tracks. An industry selecting a disadvantageous location for reasons justifiable to itself has no right to call upon carriers to overcome such disadvantage at their expense and this is what the industries outside of the zone, so far as the legal situation is concerned, did.

It follows, therefore, that the order of the commission was erroneous and must be enjoined and suspended.

[File endorsement omitted.]

49

In United States District Court

[Title omitted.]

Dissenting opinion

Filed March 8, 1923

Witmer, Dist. Judge, dissenting.

The Interstate Commerce Commission found that the practice of the Pennsylvania Railroad Company and the Western Maryland Railway Company of extending the use of their tracks to each other for the purpose of terminal receipt and delivery of freight at industries at York within a zone described (between Beaver Street and West Market Street crossing) while refusing to extend the use of their tracks for the purpose of delivery or receiving freight at other industries, similarly located but without the zone, under substantially similar circumstances and conditions, is subjecting various shippers and industries to undue prejudice and on this finding the commission rested the order to cease and desist in practicing the undue prejudice found to exist.

This order has been brought here on complaint of the Pennsylvania Railroad Company, claiming that it was beyond the authority of the commission on the finding to enter an order interfering with the practice of the companies as found.

The action of the commission is said to be based on section III of the interstate commerce act of 1887, which provides "that it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to undue or unreasonable prejudice or advantage in any respect whatsoever."

50

The commission having found that unlawful discrimination or unreasonable prejudice and disadvantage results from the practice found to exist, by authority of section 15 of the act (copy section 15 of the act) was empowered to enter the order made.

If the action of the commission exercised was not absolutely without want of conformity to statutory authority and not unsupported

by testimony, the court will not disturb it. Proctor & Gamble, etc., vs. United States, 225 U. S. 282, Interstate Commerce Commission vs. D. L. W. R. R., 220 U. S. 235; Los Angeles Switching Case, 234 U. S. 294; Houston & Texas Ry. vs. U. S. 234 U. S. 342.

Defendant company's reliance here is on the alleged principle of law that no prejudice, preference, or discrimination prohibited by the act can result from the possession, extension, or acquisition of trackage facilities to or by one carrier over the tracks of the other. In other words, without public demand, which, it has been found, does not here exist, it is argued that the railroad companies may extend or retract its lines or use of each others tracks at will without regard to the effect on shippers and having used its existing facilities merely by the practice of extending the trackage facilities between Beaver Street and West Market Street crossing impartially as effecting shippers within the zone, the commission may not legally find that such results in discrimination against or to the prejudice of others located in the vicinity and along the lines of the parties associated in the practice but beyond the zone favored, upon the principle that the extension of trackage facilities either by trackage agreement or otherwise does not support the charge of undue prejudice. This proposition is generally sound, but where, as it has herein been found, the advantage of the shipper within the zone results from the contract of the carriers and not from a controlling transportation difference the situation of industries inside and outside of the zone being substantially similar from the standpoint of carriage, the exception to the general rule arises.

51 The discrimination arises not alone from the use of the particular track or tracks but from the use of both interchangeably as fully set forth and found by the commission. The two roads P. and W. M. unquestionably interchange traffic with each other and without distinction between competitive and non-competitive traffic. The cars of both roads are moved over the individually owned tracks of the other within the zone to and from the industries on the other, and both lines are rendered equally available to industries located exclusively on one. It is not contended that the discrimination found arises from denying to anyone within the zone of agreement what is denied to others so located, but the discrimination or prejudice found lies in a comparison of advantages similarly located within and without the zone; but the reply is that such comparison cannot be tolerated, since the companies have a right to use their properties as they choose as long as they deal with those in a favored locality alike. This doctrine should not find approval. If true, the two companies may at any time at will restrict its favored locality by confining their trackage agreement over a limited area of a square or even less extent along the favored area or zone without regard even of those whom by the present arrangement they are obliged to serve without undue prejudice.

Appearing that the commission has not acted arbitrarily in finding that prejudice results from the practice of the companies within the zone as compared with interests located beyond similarly located in the same situation, it cannot be said that their order was beyond the statute authorizing their action. *Pennsylvania Company vs. U. S.*, 236 U. S. 351, *Louisville & Nashville R. R. vs. United States*, 238 U. S. 1, 18, 19. In the former case at the instance of the Buffalo, Rochester, and Pittsburgh Railway Company it was held by the Interstate Commerce Commission "that in as much as the Pennsylvania Company's refusal to accept from and 52 move to the Rochester Company carload lots of freight within the switching limits of New Castle, while performing the service in connection with the said other three carriers by mutual agreement within said switching limits, was a discrimination, the same was undue, unreasonable, and in violation of the act to regulate commerce, followed by an order to direct the Pennsylvania Company to cease and desist from such undue and unreasonable practice discriminatory as against the Rochester Company. An injunction was denied by the District Court. The Supreme Court in affirming this action stated all that the commission ordered was that the company desist from discriminatory practice herein involved, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitations, and the District Court was right in so determining.

Now can it be said that their order is voidable because it is not confined to the regulation of interstate commerce. The subject under consideration related to such commerce, and, presuming that they acted within their scope of their authority, it may be inferred that their action related to such commerce without making definite mention of it in the order.

[File endorsement omitted.]

53

In United States District Court

[Title omitted.]

Final decree

Filed March 20, 1923

This cause came on to be heard on the application of the petitioner for an interlocutory injunction and the motions of the United States and the Interstate Commerce Commission to dismiss the petition, and the same was argued by counsel and submitted to the court; thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

1. That the motion of the United States to dismiss the petition be, and the same is hereby, denied.
2. That the motion of the Interstate Commerce Commission to dismiss the petition be, and the same is hereby, denied.

3. That the application for interlocutory injunction be, and the same is hereby, granted, as prayed in the petition and the order of the Interstate Commerce Commission in case *Manufacturers Association of York v. The Pennsylvania Railroad Co., et al.*, No. 11455, on the docket of the commission, entered July 11, 1922, as amended September 6, 1922, and referred to in the petition, be, and the same is hereby, temporarily annulled, suspended, and enjoined.

Thereupon, again came the respondents, by their respective counsel, and elected to stand upon their respective motions to dismiss, and to plead no further to the petition; and thereupon came the petitioner, by its counsel, and moved the court that the interlocutory injunction be made permanent; and the same was argued by counsel; and thereupon, upon consideration thereof it was further ordered, adjudged, and decreed as follows, viz:

1. That the interlocutory injunction heretofore issued be, and the same is hereby, made permanent.

2. That the order of the Interstate Commerce Commission in case *Manufacturers Association of York v. The Pennsylvania Railroad Co. et al.*, No. 11455, on the docket of the commission, entered July 11, 1922, as amended September 6, 1922, and referred to in the petition, be, and the same is hereby, permanently and forever annulled and suspended; and that the respondents, and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whosoever, be permanently and forever restrained and enjoined from enforcing, or in any manner attempting to enforce or carry out, the said order or any of the terms thereof.

(Signed) J. WARREN DAVIS,
United States Circuit Judge.

(Signed) ROBERT M. GIBSON,
United States District Judge.

Approved as to form only.

B. E.,
For United States of America.

P. J. FARRELL,
For Interstate Commerce Commission.

[File endorsement omitted.]

54

In United States District Court

[Title omitted].

Petition for appeal

Filed March 26, 1923

United States of America, respondent, and Interstate Commerce Commission, intervening respondent, feeling themselves aggrieved by the final order or decree of the District Court made and entered

March 20, 1923, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

Respondents pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

BLACKBURN ESTERLINE,
United States Attorney, Middle District of Pennsylvania.
(Signed) ANDREW B. DUSNMORE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

[File endorsement omitted.]

55

In United States District Court

[Title omitted.]

Assignment of errors

Filed March 26, 1923

Commission, intervening respondent, now come by their respective counsel, and in connection with their petition for appeal file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered March 20, 1923.

The District Court erred:

I. In issuing the interlocutory injunction.

II. In denying the motion of the United States to dismiss the petition and in not sustaining the motion.

III. In denying the motion of the Interstate Commerce Commission to dismiss the petition and in not sustaining the motion.

IV. In deciding, holding, and adjudging as follows:

It has been repeatedly held that where one company serves a community or industry located on the tracks of another under a trackage arrangement the situation in effect is the same as if the former company had extended its own tracks to such community or industry. *Commercial Club of Superior, Wis., v. Great Northern Ry.*, 24 I. C. C. 96; *Penick & Ford v. Director General*, 61 I. C. C. 173; *Louisville & Nashville Railroad Company v. United States et al.*, 242 U. S. 60. The industries, therefore, located along the tracks of either company in the zone are in law to be considered as

on the individual tracks of both companies and the industries beyond this zone as located on the tracks of one of the companies only. Consequently in legal effect those industries which are within the zone and those without the zone are not similarly situated, but are in a substantially different position. And so the advantage enjoyed by the industries within the zone over those without the zone is not, within the meaning of the act, an undue or unreasonable preference. *Ridge Coal Mining Co. v. Missouri Pacific R. R. Co.*, 62 I. C. C. 259; *Dering Mines Co. et al. v. Director General*, 62 I. C. C. 265; *Louisville & Nashville Railroad Company et al. v. United States et al.*, supra. "A carrier must use its existing facilities impartially," and the railroads, under the facts in this case, are under no obligation to extend or curtail their facilities. The legal position of the industries in the zone is just the same as though they were located at some other part of the city away from the tracks. An industry selecting a disadvantageous location for reasons justifiable to itself has no right to call upon carriers to overcome such disadvantage at their expense, and this is what the industries outside of the zone, so far as the legal situation is concerned, did.

V. In making and entering the following order or decree:

1. That the motion of the United States to dismiss the petition be, and the same is hereby, denied.
2. That the motion of the Interstate Commerce Commission to dismiss the petition be, and the same is hereby, denied.
3. That the application for interlocutory injunction be, and the same is hereby, granted, as prayed in the petition and the order of the Interstate Commerce Commission in case *Manufacturers Association of York v. The Pennsylvania Railroad Co. et al.*, No. 11455, on the docket of the commission, entered July 11, 1922, as amended September 6, 1922, and referred to in the petition, be, and the same is hereby, temporarily annulled, suspended, and enjoined.

VI. In making and entering the following further order or decree:

1. That the interlocutory injunction heretofore issued be, and the same is hereby, made permanent.
2. That the order of the Interstate Commerce Commission in case *Manufacturers Association of York v. The Pennsylvania Railroad Company et al.*, No. 11455, on the docket of the commission, entered July 11, 1922, as amended September 6, 1922, and referred to in the petition, be, and the same is hereby, permanently and forever annulled and suspended; and that the respondents, and each of them, their officers, members, examiners, agents, and attorneys, and any or all persons whomsoever, be permanently and forever restrained and enjoined from enforcing, or in any manner attempting to enforce or carry out the said order or any of the terms thereof.

Wherefore, respondents, and each of them, prays that the final order or decree of the District Court, entered March 20, 1923, be reversed, annulled, and set aside with directions that the interlocutory and permanent injunctions shall be dissolved and the petition dismissed, and for such other and further order as may be appropriate.

(Signed) ANDREW B. DUNSMORE,
United States Attorney, Middle District of Pennsylvania.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

P. J. FARRELL,
Solicitor for the Interstate Commerce Commission.

[File endorsement omitted.]

57 [Title omitted.]

In United States District Court

Order allowing appeal

(Filed March 31, 1913)

In the above entitled case, United States of America, respondent, and Interstate Commerce Commission, intervening respondent, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered March 20, 1923, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States.

(Signed) J. WARREN DAVIS,
United States Circuit Judge.

CHARLES B. WITMER,
ROBERT M. GIBSON,
United States District Judges.

[File endorsement omitted.]

58

In United States District Court.

[Title omitted.]

Præcipe for record

Filed March 26, 1923

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of the United States of America and the Interstate Commerce Commission and include therein, in the order given below, the following matter, viz:

1. Petition and exhibits.
2. Motion of the United States to dismiss.
3. Motion of the Interstate Commerce Commission to dismiss.
4. Opinion of the court and dissenting opinion.
5. Final decree.
6. Petition for appeal.
7. Assignment of errors.
8. Order allowing appeal.
9. Præcipe for record.
10. The journal entries in their appropriate order.
11. Citation.

(Signed) ANDREW B. DUNSMORE,
United States Attorney, Middle District of Pennsylvania.
 BLACKBURN ESTERLINE,
 Assistant to the Solicitor General.
 P. J. FARRELL,
 Solicitor, Interstate Commerce Commission.

[File endorsement omitted.]

59

In United States District Court

[Title omitted.]

Docket entries

Sept. 23, 1922.—Petition and bill of complaint. Subpœna issued returnable October 13, 1922, also certified copy of petition.

Sept. 28, 1922.—Acceptance of service of Guy D. Goff, Acting Attorney General, on behalf of the United States. Acceptance of service on behalf of Interstate Commerce Commission by P. J. Farrell.

Oct. 4, 1922.—Subpœna returned served upon A. A. Vosburg, Assistant United States Attorney, also copy of petition.

Oct. 16, 1922.—Intervention of Interstate Commerce Commission provided by section 212 of the Judicial Code, 36 Stat. 1150, and

appearance of P. J. Farrell, counsel I. C. C. Motion to dismiss by Interstate Commerce Commission.

Oct. 24, 1922.—Motion to dismiss by the United States of America

Nov. 15, 1922.—Copy of order of the Interstate Commerce Commission, dated Nov. 7, 1922, modifying the order made in the case of Manufacturers Association of York, Pa., *vs.* Pennsylvania Railroad Company, Maryland & Pennsylvania Railroad Co., and Western Maryland Railroad Co., No. 11455, the terms of which was made effective Nov. 6, 1922, is further modified to become effective Feb. 6, 1923.

Dec. 28, 1922.—Copy of decree of Interstate Commerce Commission further modifying order making same effective March 6, 1923, instead of Feb. 6, 1923.

Mar. 8, 1923.—Opinion. Dissenting opinion of Hon. Charles B. Witmer, District Judge.

Mar. 20, 1923.—Final decree.

Mar. 26, 1923.—Petition for appeal. Assignments of error. Præcipe for record on appeal.

Mar. 31, 1923.—Order allowing appeal returnable in thirty days.

60

• • In United States District Court

Clerk's certificate

I, G. C. Scheuer, clerk of the District Court of the United States of America for the Middle District of Pennsylvania, do hereby certify that the writings annexed to this certificate are true copies of their respective originals, docket entries, petition and exhibits, motion of United States to dismiss, motion of Interstate Commerce Commission to dismiss, opinion, dissenting opinion, final decree, petition for appeal, assignment of errors, order allowing appeal, præcipe for record on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Scranton, this 25th day of April, in the year of our Lord one thousand nine hundred and twenty-three and of the independence of the United States the 147th.

[SEAL.]

G. C. SCHEUER,

Clerk U. S. District Court.

61

In United States District Court

[Title omitted.]

Notice of Appeal

To the Honorable George C. Woodruff, Attorney General of the State of Pennsylvania:

You are hereby notified that the above-entitled cause was, on April 2, 1923, appealed to the Supreme Court of the United States,

and that the order allowing the appeal makes the same returnable within thirty (30) days from that date.

This notice is given you pursuant to urgent deficiencies act, October 22, 1913 (38 Stat. 221).

(Signed) BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

April 4, 1923.

Service of a copy of the within notice is hereby admitted and acknowledged this 5th day of April, 1923.

(Signed) GEORGE W. WOODRUFF,
Attorney General of Pennsylvania.

62 [Citation in usual form showing service on H. W. Bikle omitted in printing.]

63 In United States District Court

[Title omitted.]

Stipulation re map.

By their respective counsel the parties stipulate that the appellants shall furnish to the clerk for the use of the court and the clerk on the hearing of this appeal a sufficient number of copies of the map styled "Plan of York, Penn., Pennsylvania System, Eastern Division," scale 1:1000, showing railroad and trolley lines through city of York, 30x46" with colors, and in printing the transcript the clerk may omit the map.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

HENRY ADOLF EIKLI,
Solicitor for Appellee.

6th March, 1924.

[File indorsement omitted.]

[Indorsement on cover:] File No. 29,630. Middle Pennsylvania D. C. U. S. Term No. 68. The United States of America and Interstate Commerce Commission, appellants, vs. Pennsylvania Railroad Company. Filed May 19th, 1923. Filed No. 29,630.